BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
8-23-16
04:59 PM

Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.	Investigation 15-11-007 (Filed November 5, 2015)

RESPONSE OF THE OFFICE OF RATEPAYER ADVOCATES TO THE "MOVING PARTIES' MOTION REQUESTING CLARIFICATION OF THE ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE"

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August 23, 2016

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I. INTRODUCTION

The Office of Ratepayer Advocates (ORA) opposes the "Moving Parties"[1] request for clarification of the Administrative Law Judge's (ALJ's) ruling partially granting the carriers' Motion to Strike, dated August 8, 2016 (MTS Ruling). The Moving Parties (MPs) seek to strike additional portions of ORA's Opening Brief (OB) that relate to carrier subscription data, above and beyond the portions that relate to the data stricken by the MTS Ruling. However, the MPs' request should be denied, because the MPs a) misrepresent the scope of the Federal Court preliminary injunction; b) misstate the scope of the data stricken by the MTS Ruling; and c) seek to strike references to "availability data", which was not the subject of the Federal Court preliminary injunction, the Coalition's motion to strike, or the MTS Ruling, and is considered "public" by the Federal Communications Commission (FCC).

[1] The "Moving Parties" consist of a number of carrier-parties to this proceeding, but a different set of parties than the Communications Industry Coalition (Coalition) that filed the Motion to Strike.

II. DISCUSSION

The MPs' Request for Clarification of the MTS Ruling (Request for Clarification) recounts the background of the August 3, 2016, *Order Granting Motion To Enforce Or Clarify Injunction* by Judge Chhabria (Federal Court Order), the Coalition's July 29 *Motion To Strike And Objections To Proposed Official Notice* (Motion to Strike), and also the Coalition's August 4 *Supplement To The Communications Industry Coalition's Motion To Strike, Addressing Federal Court Order* (Supplement).

The MPs' Request for Clarification essentially seeks to strike additional testimony from the record, which was not stricken by either the Federal Court or the ALJ in this proceeding. They seek to clarify that data in Columns 2-5, 8, and 9 of Table 13 of Exhibit 16 (Direct Testimony of Lee L. Selwyn dated June 1, 2016, on behalf of ORA) are also struck from the record of this proceeding, in addition to Columns 6 and 7 of Exhibit 16 that were already stricken by the MTS Ruling.[2] (The August 3 Federal Court Order did not strike anything from the record.) In addition, the MPs seek to strike the portions of ORA's OB that relate to the additional data they claim should now be stricken.

The data utilized in ORA's OB was part of the official record of this proceeding, and was appropriately used by ORA in its OB. However, the MPs attempt to argue that the MTS Ruling somehow did not comply with the Federal Court Order, which misrepresents what the Order actually says. Even though the Federal Court Order and the MTS Ruling denied their requests to strike portions of Exhibit 16, the carriers continue to argue as if their requests were granted.

A. The MPs Misrepresent the Scope of the Federal Court Order

The MPs argue that because the Federal Court Order limited Dr. Selwyn's access to subscription data, it therefore follows that any calculations he performed using that data should be stricken from the record. The carriers' logic is that he could not have

[2] Request for Clarification at 4.

performed his analysis "unless he had access to the Form 477 subscription data, which per the PI Order, Dr. Selwyn should not have had access to for purposes of developing his June 1 Testimony."[3] However, they have raised this argument twice already, and it has been rejected both times.

First, in the carriers' June 28 *Motion to Enforce Preliminary Order* before Judge Chhabria, the carriers requested that: "the Court should prohibit the CPUC from taking any actions in its ongoing proceeding in reliance on Dr. Selwyn's testimony utilizing the Form 477 data pending the Court's resolution of Plaintiffs' motion for a permanent injunction."[4] The carriers clarified this request by asking the court to "require the withdrawal of any testimony, again, including Dr. Selwyn's, that relied upon those data."[5]

Second, the carriers raised this argument in their August 4 Supplement motion to the ALJ, stating: "to effectuate the Court's order, the testimony that ORA filed using that data on June 1 and July 15, 2016, contravenes the preliminary injunction and must be stricken."[6]

The August 3 Federal Court Order by Judge Chhabria, which is attached to the Coalition's Supplement, clarifies the preliminary injunction as follows: "the CPUC may not allow anyone other than a direct employee to possess the data that are the subject of the injunction", and thus directs the CPUC to "retrieve any of the data in Dr. Selwyn's possession immediately." The Order does not state that the Commission must strike any of Dr. Selwyn's testimony from the record, *even though the Coalition specifically requested that he do so*. The Federal Court Order states that "[t]he remaining requests by the plaintiffs are denied as overbroad, unripe, or unnecessary." Thus the Order denies the

[3] Request for Clarification at 5.

[4] Coalition Motion to Enforce Preliminary Injunction at 10.

[5] *Id*. at 11.

[6] Coalition Supplement to Motion to Strike at 2.

request to strike portions of Exhibit 16 from the record, and there is no reason to do so now.

Further, in the MTS Ruling dated August 8, the ALJ correctly notes: "The May 20 and August 3, 2016 Orders explicitly do not contest the Commission's ability to use the granular, disaggregated (carrier-specific) subscription data in question. Nor does that granular data appear in Dr. Selwyn's testimony."[7] The MTS Ruling follows the letter and intent of the Federal Court Order, which did not strike any of Dr. Selwyn's analysis.

B. The MPs Misstate the Rationale of the MTS Ruling

The MPs point out that the MTS Ruling struck Columns 6 and 7 from Table 13 of Exhibit 16, but not Column 5 titled "Total Subs. with 25/3 in Footprint".[8] The MPs argue that Column 5 is "clearly subscription data and appears to be a sum of the provider-specific Form 477 subscriber data in Column 6 that, per the PI Order, Dr. Selwyn should not have had access to and which the MTS Ruling specifically struck." However, as noted above, the Federal Court Order never struck any data from the record, and thus the MTS Ruling was not obliged to strike any of Dr. Selwyn's analysis based on the data, and correctly did not do so.

Instead, the MTS Ruling, in an abundance of caution, struck data from Table 13, but not any of the analysis based on the data. Furthermore, the MTS Ruling did not strike the other tables in Exhibit 16 that contain subscription data. For example, Tables 11A and 11B (County Level HHIs and MDIs), and Table 12 (Metropolitan Area HHIs and MDIs) are not stricken from the record. This is because there is an important distinction between Tables 11A and 11B and 12, and Table 13 – that is, Tables 11 and 12 utilize aggregated, county level subscription data that reveals nothing about the carriers in each county. As noted above, the MTS Ruling found that the use of granular, carrier-related subscription is not prohibited by the Federal Court Order, but nevertheless the MTS Ruling strikes Table 13 which lists carrier-specific data, presumably because such carrier-

[7] MTS Ruling at 4.

[8] Request for Clarification at 4.

specific data may be at issue "pending final resolution of the federal court litigation."[9] Tables 11A, 11B, and 12 do not reveal any carrier-specific data. Table 13 reveals aggregated carrier-specific data within the carriers' footprints, and it appears that in an abundance of caution the ALJ struck the two columns from Table 13 that reveal overly specific data.

It is important to note that ORA *did not use any part of Table 13* in its OB, although it was not prohibited from doing so. The HHI and MDI discussion by ORA in its OB relies solely on aggregated county level data in Tables 11 and 12.[10]

However, the MPs do not restrict their request to removing merely Column 5 of Table 13. The carriers go way beyond that, requesting that "any testimony that Dr. Selwyn developed based on his having access to "Commission Only Information," which he has since returned to the Commission pursuant to Judge Chhabria's 8/3 Order, must be deleted, including but not limited to any Tables with such data, any sections of his testimonies discussing his HHI and MDI calculations and any conclusions he reached based on those calculations."[11] Additionally, the carriers also request Column 9 of Table 13 be stricken, and Tables 11A, 11B, and 12 also be stricken in their entirety. Finally, the carriers demand that "ORA should also be directed to file a revised opening brief in accordance with the revised versions of Dr. Selwyn's testimony."[12] The sole basis is a purported "understanding" by the carriers that the MTS Ruling meant to strike all testimony related in any way to subscription data of any kind, even though it did not so state.

The carriers' misstate the rationale behind the MTS Ruling. They allege that the MTS Ruling "recognizes" that Dr. Selwyn's testimony includes data "which have been

[9] MTS Ruling at 4.

[10] See for example, pages 52-54 of ORA's OB.

[11] Request for Clarification at 5.

[12] Request for Clarification at 6.

designated as "Commission Only Information.""[13] However, they ignore other statements in the MTS Ruling that specifically permit the use of subscription data. For example, the MTS Ruling states: "the Commission can – under both California law and the Court's May 20 and August 3, 2016 Orders – use the underlying data."[14] The MTS Ruling further notes that "statewide subscription numbers appear in the public record and are submitted in ARMIS reports as generically "confidential,"" (i.e., not Commission-only). Thus, the MTS Ruling does not imply, much less state, that all analysis of subscription data must be removed from the record. The MTS Ruling states clearly that the Commission is not required to strike any data based on the letter and intent of Federal Court Order, and it only strikes two columns of one table in Exhibit 16 solely in an abundance of caution, not because of any alleged requirement. Striking testimony from the official record was clearly not the stated intent of either the Federal Court Order or the MTS Ruling, despite being repeatedly requested to do so by the carriers.

C. The MPs Seek To Strike "Availability" Data, Which was not the Subject of the Preliminary Injunction or the MTS Ruling

Finally, the MPs seek to strike Columns 2-4 and 8 of Table 13, because "these columns all appear to be based on Form 477 availability data."[15] The carriers' apparently argue that availability data for 2015 is not yet publicly available. (Availability data[16] as reported on Form 477 is the number of households in a given geographic area (census block) where a carrier offers service, as opposed to the number of households that actually do subscribe.) However, this is a novel argument that has not been raised by the carriers in Federal Court, in their Motion to Strike, or in their Supplement to their Motion to Strike, and should be denied.

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[13] Request for Clarification at 4.

[14] MTS Ruling at 4.

[15] Request for Clarification at 4.

[16] Also referred to as "deployment data" by the FCC.

Although the FCC's Form 477 contains availability data as well as subscription data, availability data has long been publicly available.[17] Since it is public, there is obviously no FCC policy that requires availability data to be maintained as "Commission Only", and thus there is no grounds to strike the data at this time. The carriers have never made the argument that availability data should be stricken from Dr. Selwyn's testimony, and it is too late to try now.

III. CONCLUSION

The Commission should deny the Moving Parties' Request for Clarification for the reasons stated herein. The carriers seek to strike data and analysis that is essential in evaluating the telecommunications marketplace in California – data that the Commission is legitimately entitled to receive and utilize in making its findings in this proceeding regarding the state of competition in California.

Respectfully submitted,

/s/ TRAVIS T. FOSS

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August 23, 2016

[17] https://www.fcc.gov/general/broadband-deployment-data-fcc-form-477
https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2016-broadband-progress-report
https://www.fcc.gov/reports-research/maps/bpr-2016-fixed-25mbps-3mbps-deployment/
https://www.fcc.gov/reports-research/maps/bpr-2016-fixed-25mbps-3mbps-providers/.